No. 89-1590

Supreme Court, U.S.
FILED
APR 10 1990
JOSEPH F. SPANIOL, JR.
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IN THE

Supreme Court of the United States

October Term, 1989

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

against

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General
Counsel of Record

JANE LAUER BARKER
Assistant Attorney General
In Charge of Labor Bureau
Of Counsel

QUESTION PRESENTED

Does ERISA preempt the states from requiring that public work contractors either provide prevailing fringe benefits or pay workers a cash amount equal to the cost of the benefits?

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

NEW YORK STATE DEPARTMENT OF LABOR, THOMAS F. HARTNETT, Commissioner of Labor of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Petitioners,

— against —

GENERAL ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above action on November 29, 1989.

OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 891 F.2d 25 (2d Cir. 1989) and is reprinted in the appendix to the petition at 1a-15a.[1] The

[1]References to the appendix will be cited as "__a".

memorandum decision of the United States District Court for the Southern District (Carter, D.J.) is reported at 698 F. Supp. 1093 (S.D.N.Y. 1988) and is reprinted at 17a-36a.

JURISDICTION

On September 29, 1988, the District Court denied respondent's motion for a preliminary injunction against enforcement of N.Y. Labor Law § 220 (36a). The Court of Appeals on November 29, 1989 vacated the District Court's order and remanded the matter for further proceedings in light of that court's opinion (11a). On January 10, 1990, the Court of Appeals denied a timely petition for rehearing (16a). This petition is filed within 90 days of the denial of the petition for rehearing. The jurisdiction of the Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The applicable statutes are reproduced in the appendix at 37a-40a. The relevant federal statutory provisions are §§ 1002 and 1144(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.* The relevant New York State statutory provisions are N.Y. Labor Law §§ 220 (3) and (5) (a)-(c).

STATEMENT OF THE CASE

A. The History And Operation Of Section 220

The New York State prevailing wage law, N.Y. Labor Law § 220 *et seq.* (McKinney 1986), requires that laborers,

workers, and mechanics on public work projects be paid not less than the rate of wages and wage supplements which prevail in the same trade and locality of the project. N.Y. Labor Law § 220(3) (first and second undesig. paras.) (McKinney 1986) (38a). Wage supplements are defined in the law as "all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages'," including benefits such as health insurance, vacation and holiday pay. N.Y. Labor Law § 220(5)(b) (McKinney 1989) (40a).

The prevailing wage law was enacted in 1897. 1897 N.Y. Laws ch.415. In 1938, the requirement to pay prevailing wages on public work projects was made a part of the New York State Constitution. N.Y. Const. art. 1 § 17 (McKinney 1982). As originally enacted, the prevailing wage law did not require the payment of prevailing wage supplements. As fringe benefits became an increasingly important part of an employee's compensation, often offered by employers in lieu of additional wages, contractors who did not pay fringe benefits, or whose benefits did not meet area standards, enjoyed a competitive advantage in bidding on public work contracts. In order to address this problem, which was perceived as being unfair to union contractors who paid benefits, the Governor requested that the Labor Law be amended to include "'fringe benefits'—such as vacation pay, various forms of insurance, and pensions — as an element in the wage rate." Governor's Ann. Message to Legis., 1956 McKinney's Session Laws of N.Y. 1510, 1517. The statute was amended in 1956 to require public work contractors to provide the locally prevailing supplements. 1956 N.Y. Laws ch. 750. As noted by the New York State Court of Appeals, the amended statute "does not specify whether compliance is to be determined by consideration

of the employer's expenditures for benefits or by consideration of the qualitative nature of the actual benefits made available." *Action Elec. Contr. Co. v. Goldin*, 64 N.Y.2d 213, 221, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984). That court resolved the ambiguity when it struck down the New York City Comptroller's interpretation of the statute as requiring that contractors must provide the prevailing supplements by contributions to an in-kind benefits package equivalent to the prevailing supplements plan. *Id.* at 220. Since the legislative history of the supplements provision reflected "only a concern to equalize contractors' minimum labor costs," that purpose was met "when a contractor pays in cash, totally or partially, the cost of prevailing supplemental benefits." *Id.* at 222. The State Court of Appeals concluded "[T]his provision should not be interpreted to require that the employer maintain or contribute directly to a benefits plan equivalent in kind to the prevailing one in order to comply with the statute." *Id.*

The prevailing wage and wage supplement rates are determined annually by the fiscal officer.[2] N.Y. Labor Law § 220(5)(a) and (c) (39a-40a).[3] The wage supplement rates are based on the cost per worker of providing a particular benefit, not the value of that supplement to the worker. Under *Action Elec. Contr. Co. v. Goldin*, a contractor may

[2]The fiscal officer for all public work contracts, other than those on behalf of New York City, is the Commissioner of Labor of the State of New York ("Commissioner"). N.Y. Labor Law § 220(5)(e). For New York City contracts, the City Comptroller acts as the fiscal officer. *Id.*

[3]As applied to the time period covering this case, the prevailing wages and supplements are defined as those amounts paid under collective bargaining agreements covering 30 percent of the workers in the same trade in the locality where the work is to be performed. N.Y. Labor Law § 220(5)(a),(c) (39a-40a).

comply with the prevailing supplement requirement in one of three ways: by providing an equivalent benefit plan, by paying the workers the amount of the supplement in cash, or by providing a combination of benefits and cash equal to the prevailing supplement amount. 64 N.Y.2d at 221-22. Public work contractors who choose to provide one or more of the prevailing supplements through employee benefit plans are permitted to credit the cost of providing each such benefit toward their obligation to pay the corresponding prevailing supplement amount (JA 115a).[4] Contractors do not receive credit for benefits provided which are not prevailing benefits (JA 117a).

B. The G.E. Contract And The Department's Investigation

On or about January, 1987, respondent General Electric Company ("GE") was awarded a $3.6 million contract by the Long Island Railroad ("LIRR") for transformer maintenance and repair in Nassau, Suffolk, Queens and Kings Counties of New York (JA 113a). The contract was subject to N.Y. Labor Law § 220, and the contract specifications for the project included a schedule of the prevailing wages and wage supplements for each of the four counties, as determined by the Commissioner pursuant to Labor Law § 220(3).

GE is a party to a collective bargaining agreement with Local 3, International Brotherhood of Electrical Workers (IBEW), AFL-CIO. Collective bargaining agreements

[4] References to "(JA__)" are to the Joint Appendix filed in the Court of Appeals.

between GE and Local 3 have been in effect continuously during the LIRR project (JA 4a-6a). These agreements provide for wages and fringe benefits which are less than the amounts contained in the applicable prevailing wage schedules (JA 95a-96a, 117a, 127a).

In 1987, the New York State Department of Labor ("Department") commenced an investigation of the wages and wage supplements paid by GE to its employees performing work on the LIRR project (JA 116a). GE provided information to the Department as to wages and hours and a breakdown of the cost of its fringe benefits (JA 116a, 126a). The Department used that information to determine whether there were wage and supplement underpayments to workers on the LIRR project (JA 117a). To determine if there were wage underpayments, the Department compared the hourly wage paid by GE to the hourly wage rate for the appropriate job classification on the applicable prevailing wage schedule (JA 117a). To determine if there were wage supplement underpayments, the Department compared the GE benefits and their cost with the prevailing supplements and supplement amounts listed on the applicable prevailing wage schedule (JA 117a). Where GE provided a supplement listed on the applicable schedule, GE's cost for that benefit was credited toward the payment of the prevailing supplement amount (JA 117a).

On or about April 19, 1988, the Department completed its audit of the wages and supplements paid by GE on the LIRR project from its inception through the end of 1987, and informed GE of its preliminary finding that GE had underpaid an estimated $102,623.93 in wages and $59,494.65 in supplements (*i.e.*, supplement costs) (JA 81a-86a). The notice also informed GE that a hearing would be held to determine if it was liable for wage and

supplement underpayments, including interest and a penalty (JA 81a).[5]

C. The Proceedings Below

On July 22, 1988, GE commenced this action for a declaratory judgment and an injunction, invoking federal question jurisdiction under 28 U.S.C. § 1331, and sought a preliminary injunction against enforcement of Labor Law § 220 on GE's public work project for the LIRR (JA 1a-91a). GE alleged that enforcement of § 220 against it is preempted by the National Labor Relations Act, 29 U.S.C. § 151 *et seq.* ("NLRA"), ERISA, and the Railway Labor Act, 45 U.S.C. § 151 *et seq.* ("RLA"), and violates state law (JA 10a-13a).

The parties stipulated at a hearing before the district court that the issues for the court's determination were whether the prevailing wage law was preempted by either the NLRA or ERISA, and whether the law could be properly applied to the LIRR under either federal or state law (JA 138a). The parties agreed that these issues were purely legal issues requiring no fact-finding by the court.

On September 29, 1988, the district court denied GE's motion for a preliminary injunction. The court found "no merit" to GE's claims that the prevailing wage law was

[5]Pursuant to N.Y. Labor Law § 220-b(2), when wages or supplements appear to be due to workers on a public work project, the fiscal officer is required to notify the contracting agency (here, the LIRR) to withhold from any payment due the contractor sufficient money to satisfy the unpaid wages and supplements, including interest and any civil penalty that may be assessed, pending a final determination of the contractor's compliance with the prevailing wage law. Here, money was withheld by the LIRR from GE, although it was released upon GE's posting of a bond sufficient to cover the estimated underpayment, interest and penalty.

preempted by the NLRA, ERISA or other federal statutes (36a). As to GE's ERISA claim, the district court adopted the reasoning of the district court in *Rondout Elec., Inc. v. New York State Department of Labor,* 84 Civ. 3095 (S.D.N.Y. 1984) (Sand, D.J.):

> The statute does not require the maintenance of [ERISA] plans, regulate their terms or do anything other than consider the value to the employee of contributions to such plans as compared to the value of contributions made to similar plans by other employers in the industry and locality.

(33a-34a). In addition, the court concluded that the Eleventh Amendment to the United States Constitution barred it from considering GE's claim that state law precluded application of the prevailing wage law to the LIRR (35a).[6] On October 25, 1988, GE filed a notice of appeal (JA 181a).

On November 29, 1989, the Court of Appeals vacated and remanded (1a). The court held that § 220 is preempted by ERISA as applied to contractors such as GE because it requires them "either to bring their pension and welfare plans into conformity with those prevailing in the locality...or to make up the difference through cash payments to their employees." 891 F.2d 29 (10a-11a). It so held despite its recognition that the law permits a contractor to comply by making cash payments directly to its workers, thus requiring no modification of an employer's ERISA plans. As to the cash payment option, the majority cited *Fort Halifax Packing Co. v. Coyne,* 482 U.S. 1 (1987),

[6]GE did not pursue this claim on appeal or its claim of RLA preemption.

distinguishing it on the ground that here the cash payments are "continuous" payments over the course of the project, not single lump sum payments. 891 F.2d at 29 (9a).

The dissent, opining that "the majority overstates the impact of New York's prevailing wage law...", concluded that, since the law permits a contractor to comply by paying the cash equivalent of the benefit to the workers, N.Y. Labor Law § 220 does not interfere with any of the "primary administrative functions" of ERISA plans, has no necessary effect on an employee's eligibility for benefits or the amount of benefits received under a plan, and, thus, is not preempted by ERISA. *Id.* at 30 (13a). The dissent noted:

> [I]f it chooses, a contractor may provide a combination of cash and benefits, or simply benefits alone, but nothing in the law forces employers to take either of these options; indeed, considerations of efficiency would encourage most employers to provide the cash payments rather than alter their benefit plans. *Id.* (13a).

On December 13, 1989, petitioners filed a timely petition for rehearing. The Court of Appeals denied the petition on January 10, 1990 (16a).

REASONS FOR GRANTING THE WRIT

I. The Court Of Appeals Invalidated A Law Which Serves Significant State Governmental Policies Shared Equally By Many Other States

Prevailing wage laws, such as N.Y. Labor Law § 220, are important and longstanding exercises of state governmental authority. Thirty-two states, in addition to New York,

have laws requiring the payment of prevailing wages by public work contractors, and 24 of those require as well the payment of fringe benefits.[7]

These laws reflect important state governmental policies. This Court has recognized that a state exercises broad authority when it engages in a proprietary function. *Hughes v. Alexander Scrap Corp.*, 426 U.S. 794 (1976). When a state contracts for public work construction, it performs a proprietary function. *White v. Mass. Council of Constr. Employers,* 460 U.S. 204 (1983). In that capacity, it has broad authority to prescribe minimum labor standards for the contractors with whom the state does business. *Id.; see also Atkin v. Kansas,* 191 U.S. 207 (1903). Thus, state prevailing wage laws, which mirror similar federal requirements embodied in such laws as the Davis-Bacon Act, 40 U S.C. A. § 276a *et seq.* (West 1986), are as integral to the performance of the states' proprietary functions as the federal requirements are to the federal government's duties. *See Perkins v. Lukens Steel Co.*, 310 U.S. 113 (1940).

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[7]The following states require the payment of prevailing supplements by public work contractors: Alaska, Alaska Stat. § 36.95.010(7)(1982); California, Cal. Lab. Code § 1773.1 (West 1989); Connecticut, Conn. Gen. Stat. § 31-53 (1987); Hawaii, Haw. Rev. Stat. § 104-1(1985); Illinois, Ill. Ann. Stat. Ch. 48, para. 39S-2 (Smith-Hurd 1986); Kansas, Kan. Stat. Ann. § 44-201; Kentucky, Ky. Rev. Stat. Ann. § 337.505 (Baldwin 1983); Maryland, Md. State Fin. & Proc. Code Ann. § 17-208 (1988); Massachusetts, Mass. Gen. Laws Ann. ch. 149 § 27 (West 1982); Michigan, Mich. Comp. Laws § 408.552 (1985); Minnesota, Minn. Stat. Ann. 177.42 (West 1989); Missouri, Mo. Ann. Stat. § 290-210 (Vernon 1989); Montana, Mont. Code Ann. § 18-2-403 (1989); Nevada, Nev. Rev. Stat. § 338.010 (1989); New Mexico, N.M. Stat. Ann. § 13-4-11 (1989); Ohio, Ohio Rev. Code Ann. § 4115.03 (Page's 1980); Oklahoma, Okla. Stat. Ann. tit. 40, § 196.1 (West 1980); Oregon, Or. Rev. Stat. § 279.348 (1987); Pennsylvania, Pa. Stat. Ann. tit. 43 § 165-7 (Purdon 1964); Rhode Island, R.I. Gen. Laws § 37-13-6 (1984); Texas, Tex. Lab. Code Ann. § 5159a (Vernon 1987); Washington, Wash. Rev. Code Ann. § 39.12.010 (1972); Wisconsin, Wis. Stat. Ann. § 103.39 (West 1988); Wyoming, Wyo. Stat. § 27-4-405 (1977).

In addition, states have traditionally, in the exercise of their police powers, set minimum labor standards for contractors who perform public work on their behalf. The purpose of New York's prevailing wage law is to ensure that workers performing public work do not have to accept wages below the rate paid to workers on private work in the locality of the public project. The law "is an attempt by the State to hold its territorial subdivisions to a standard of social justice in their dealing with laborers, workmen and mechanics." *Bucci v. Village of Port Chester*, 22 N.Y.2d 195, 201 (1968) (quoting *Austin v. City of New York*, 258 N.Y. 113, 117 (1932)).

The supplements provision of § 220 serves the purpose of equalizing competition for public work contracts. Its invalidation by the Court of Appeals threatens to reinstitute the inequality in bidding which the State legislature sought to end more than 30 years ago. Fringe benefits comprise a significant portion of total compensation. In 1988, they constituted approximately 30 percent of labor costs in the goods-producing sector. (1989) 79 Daily Labor Report (BNA) B-7. In this case, the prevailing supplements for the electrician job classification comprise almost 40 percent of the prevailing hourly wage of $22.15 (JA 123a). Thus, contractors who may ignore the supplement requirement would enjoy almost a $9.00 per hour per employee advantage in bidding over contractors whose benefits met prevailing standards. Such disparities could flow from the rule announced in this case by the Court of Appeals. That result would destroy the effectiveness of the entire statute. Given the large number of states whose laws also include the payment of fringe benefits, the issue involved in this case is one which has great significance beyond the immediate parties and, thus, deserves to be settled by the Court.

II. The Important Issue Presented, Which Has Been Left Open By This Court's Prior Cases, Was Decided Erroneously By The Court Of Appeals.

Despite the prevalence of prevailing wage laws, this Court has not yet addressed the viability of those laws under ERISA's preemption provision.[8] These laws were not the target of ERISA preemption. In enacting ERISA, Congress was concerned with the mismanagement of benefit funds accumulated to finance employee benefits and the failure to pay benefits from such funds. To address its concern, Congress established reporting, disclosure, and fiduciary requirements "to insure against the possibility that the employee's expectation of the benefit would be defeated through poor management by the plan administrator." *Massachusetts v. Morash*, ___ U.S. ___, 109 S. Ct. 1668, 1673 (1989).

As part of the statutory scheme, Congress adopted a preemption provision which preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan...." 29 U.S.C. § 1144(a) (1982). Senator Williams, a sponsor of ERISA, stated, in regard to the purpose of its preemption provision:

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[8] *Local Union 598, Plumbers and Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F.2d 1213 (9th Cir. 1988), *cert. denied*, ___ U.S. ___, 109 S. Ct. 210 (1988), involved Washington's prevailing wage law. That law, in contrast to New York's and many other states', including those of California, Ohio, Illinois, and Nevada, *see ante* at n.7, required that a public work contractor make contributions to a benefit plan. It was held to be preempted by ERISA on that basis.

In *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee*, 891 F.2d 719 (9th Cir. 1989), *petition for reh'g denied* (Mar. 16, 1990), the court held that California's law governing the employment of apprentices on public work projects was preempted by ERISA. We have been advised that California will be filing a petition for a writ of certiorari in that case.

> It should be stressed that with the narrow exceptions specified in the bill, the substantive and enforcement provisions of the conference substitute are intended to preempt the field for Federal regulations, thus eliminating the threat of conflicting or inconsistent state and local regulation of employee benefit plans.

120 Cong. Rec. 29933 (1974). Recently, the Court reiterated the purpose of the preemption provision:

> It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patch-work scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them.

Fort Halifax Packing Co. v. Coyne, 482 U.S. at 12. Simply stated, ERISA preemption "ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations." *Id.* (citation omitted).

In analyzing preemption and its application to any state action, "the purpose of Congress is the ultimate touchstone." *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978)). It is a broad, but not all encompassing provision. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349 (9th Cir.), *cert. denied*, 497 U.S. 949 (1986). Thus, "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or

peripheral a manner to warrant a finding that the law 'relates to' the plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 at 100, n.21 (1983). In addition, when a state acts in an area which states have traditionally regulated, "[a]bsent any indication that Congress intended such far-reaching consequences," the Court has stated its reluctance to interfere with "the separate spheres of governmental authority preserved in our federalist system." *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1675.

New York's prevailing wage law is an exercise of the State's traditional authority, involving both its proprietary authority and its police power. It is not the type of law with which Congress was concerned when it enacted ERISA's preemption provision. Moreover, since enforcement of N.Y. Labor Law § 220 does not create a risk of inconsistent or conflicting regulation of benefit plans and has only a peripheral effect on benefit plans, the Court of Appeals' preemption of the State's prevailing wage law is contrary to the decisions of this Court.

In *Massachusetts v. Morash*, __ U.S. __, 109 S. Ct. 1668, this Court addressed a state law that required an employer to pay a discharged employee any agreed-upon accrued vacation and holiday pay. The Court distinguished between allowable state regulation of wages and pre-empted state regulation of benefits. Although the definition in ERISA of an "employee benefit plan," 29 U.S.C. § 1002(1), could "surely be read to encompass any form of regular vacation payments to an employee," the Court held that Massachusetts was not preempted from requiring an employer to pay accrued vacation pay. *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1672. The Court reasoned that ordinary vacation payments are more like regular wages than benefits. Because Congress was only

concerned with regulating "benefits", which are financed out of accumulated funds and are contingent upon some future occurrence outside of the worker's control, laws which require the payment of accrued vacation benefits are not preempted. "If there is a danger of defeated expectations, it is no different from the danger of defeated expectations of wages for services performed — a danger Congress chose not to regulate in ERISA." *Id.* at 1673.

The New York State prevailing wage law requires public work contractors to pay prevailing fringe benefits either by providing equivalent benefits to the workers or by paying the cost of those benefits to them directly as cash. *Action Elec. Contr. Co., Inc. v. Goldin,* 64 N.Y.2d 215, 485 N.Y.S.2d 241, 474 N.E.2d 601. The law does not, therefore, require an employer to contribute to a "plan". Nor, under the reasoning of *Morash,* do the required cash payments themselves constitute a benefit plan such that the State's enforcement of the obligation to pay them would be preempted.

The cash payments required by the prevailing wage law are functionally identical to vacation pay, holiday pay, premium pay or any other typical wage payment. While the amount of the required cash payment may be determined by reference to an ERISA benefit plan, that factor does not transform what is essentially ordinary compensation into a benefit. The payments remain fixed amounts paid directly to workers with their regular compensation from the contractor's general assets. *See Massachusetts v. Morash,* __ U.S. __, 109 S. Ct. 1668, 1675 (accrued vacation pay not a benefit even though its payment is deferred like severance pay benefits).

ERISA was enacted to safeguard employees from the abuse and mismanagement of benefit funds. *Fort Halifax Packing Co. v. Coyne,* 482 U.S. at 15-16. The precise

coverage of ERISA is not clearly set forth in the statute and thus conceivably could be read to encompass all types of employee compensation, as this Court has recognized. *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1672. However, given that Congress' primary concern was with the mismanagement of funds and the failure to pay employees benefits from such accumulated funds, regular cash payments to workers, like the accrued vacation pay at issue in *Morash*, which are "fixed, due at known times, and do not depend on contingencies outside the employee's control .... present none of the risks that ERISA was intended to address.[9] *Massachusetts v. Morash*, __ U.S. at __, 109 S. Ct. at 1673.

Furthermore, New York's requirement of cash payments does not subject a contractor to conflicting regulation of its ERISA plans since the employer need not tamper with its existing plans to make such payments. While an employer would need to calculate the cost of its own plans in order to obtain credit against the cost of the prevailing supplements, the law does not thereby interfere with the administrative functioning of a plan or create a substantial administrative burden or cost. *See Mackey v. Lanier Collections Agency & Service Inc.*, __ U.S. __, 108 S. Ct. 2182, 2186 (1988) (State garnishment law used by creditor to enforce judgment against a participant's benefits does not "relate to" ERISA plan despite burden on plan administrators). It has, for example, no impact on claim processing, benefit eligibility determination, or benefit disbursement. Any effect on a plan by the State prevailing wage

[9]The Court's conclusion in *Morash* was bolstered by a Secretary of Labor regulation which distinguishes between benefit plans covered by ERISA and types of regular compensation not covered, which included vacation benefits paid out of general assets. 29 C.F.R. § 2510.3-1(1987).

law, therefore, would be "too tenuous, remote or peripheral" to warrant its preemption. *Shaw v. Delta Air Lines, Inc.*, 463 U.S. at 100 n.21.

The Court of Appeals, while recognizing that a contractor could comply with the state's law without modifying its existing benefit plans, cited *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, to support its invalidation of the State's cash payment requirement because GE "is required to make continuous calculations, adjustments and payments." (9a).

In *Fort Halifax*, the Court upheld, against a claim of ERISA preemption, a Maine law which requires certain employers to pay severance pay upon a plant closing. The Court held that the requirement of a one-time lump sum severance payment to workers did not "relate to" an ERISA plan because the state law did not establish, or require the employer to maintain, a "plan", in the sense of an ongoing administrative scheme to process claims and disburse benefits. *Id.* at 12.

The Court's decision distinguished the Maine statute from those state laws that required that a "plan" be established or maintained, such as the Hawaii statute involved in *Standard Oil of California v. Agsalud*, 633 F.2d 760 (9th Cir. 1980), *aff'd*, 454 U.S. 801 (1981) which required that employers provide employees with a comprehensive health care plan. See also *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978) (California law regulating funding, disclosure, sales practices and quality of services provided by plans preempted by ERISA). In those cases, the state's requirement of a particular benefit plan would have destroyed the potential for administrative efficiency for multi-state plans which

ERISA was intended to achieve by subjecting the employer to differing state regulation. See *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 105 n.25 (1983) (State laws prohibiting discrimination in benefits and requiring employers to pay specific benefits "would make administration of a uniform nationwide plan more difficult."). Since the Maine law required only a single lump sum payment which did not necessitate an administrative program to accept, process, and determine claims, the state law did not "relate to" a plan and was not preempted.[10]

The Court of Appeals distinguished this case from *Fort Halifax* on the ground that the cash payments required by N.Y. Labor Law § 220 could not be made in one lump sum, but were "continuous". 891 F.2d at 29 (9a). *Fort Halifax*, however, did not answer the question presented here, whether cash payments required to equalize labor costs "relate to" a benefit plan within the meaning of ERISA. *Fort Halifax* addressed the separate issue of whether a state requirement to pay severance pay, which is indisputably a benefit covered by ERISA, created a "plan".[11] The

[10]The Court of Appeals cited both the *Standard Oil* and *Hewlett-Packard* cases in concluding that the State prevailing wage law affects "the rules and regulations under which the plan operates" and "the nature and amount of the benefits provided thereunder...." The state laws at issue in those cases, however, bear no resemblance to N.Y. Labor Law § 220 because they actually regulated benefit plans, setting funding, disclosure, and benefit requirements. By permitting a cash equivalent option for any prevailing supplement, N.Y. Labor Law § 220 does not prescribe the nature or amount of benefits provided by a plan. Nor does the law prescribe rules for a plan's operation since it does not require that records showing supplement costs be maintained in any particular form.

[11]In *Gilbert v. Burlington Industries, Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd*, 477 U.S. 901 (1986), the Court of Appeals had held that the State could not enforce an employer's agreement to pay severance pay under various conditions to its workers. Thus, after *Gilbert*, it was unclear whether a state could require an employer to pay severance pay under ERISA.

requirement of a single lump-sum payment of severance pay in contrast to a continuing obligation to pay severance pay pursuant to individual claims did not necessitate the creation of an administrative scheme to accept, process, and determine claims. Thus, no "plan" was created by the law.

Fort Halifax is not, therefore, dispositive here. N.Y. Labor Law § 220 requires only that cash amounts be paid to the workers to equalize labor costs. These payments, continuing or not, do not create a benefit plan under ERISA. While the amount of the payments may be calculated by reference to a plan, they are deduced by simple arithmetic and do not involve the determination of individual claims, eligibility or benefit amounts. As shown in *Morash,* not every payment of compensation to workers constitutes a benefit plan under ERISA. Thus, the cash payments required by the State prevailing wage law which merely equalize labor costs do not create, or require an employer to maintain, a benefit plan. This Court should grant certiorari in order to resolve this issue.

CONCLUSION

FOR THE FOREGOING REASONS, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Dated: New York, New York
April 10, 1990

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Petitioners
120 Broadway
New York, New York 10271
(212) 341-2020

O. PETER SHERWOOD
Solicitor General

LAWRENCE S. KAHN
Deputy Solicitor General
Counsel of Record

JANE LAUER BARKER
Assistant Attorney General
In Charge of Labor Bureau
Of Counsel

APPENDICES

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 899—August Term, 1988

(Argued March 10, 1989 Decided November 29, 1989)

Docket No. 88-7922

GENERAL ELECTRIC COMPANY,

Plaintiff-Appellant,

—v.—

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS P. HARTNETT, Industrial Commissioner of the State of New York; CHARLES DROBNER, Director of Public Works, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Defendants-Appellees.

Before:

VAN GRAAFEILAND, CARDAMONE and PRATT,
Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Carter, J., denying a motion for preliminary injunction based on

alleged preemption of a State statute by ERISA. Order vacated and matter remanded for reconsideration.

JAMES S. FRANK, New York, New York (Virgil B. Day, Loraine M. Cortese-Costa, Marc S. Wenger, Vedder, Price, Kaufman, Kammholz & Day, New York, New York, of Counsel), *for Plaintiff-Appellant*.

JANE LAUER BARKER, Assistant Attorney General In Charge of Labor Bureau, New York, New York (Robert Abrams, Attorney General of the State of New York, O. Peter Sherwood, Solicitor General, Richard S. Corenthal and M. Patricia Smith, Assistant Attorneys General, New York, New York, of Counsel), *for Defendants-Appellees*.

Edward J. Groarke and Richard L. O'Hara, Mineola, New York (Colleran, O'Hara & Mills, Mineola, New York, of Counsel), *for Amicus Curiae, New York State, AFL-CIO and New York State Building and Construction Trades Council*.

VAN GRAAFEILAND, *Circuit Judge*:

General Electric Company appeals from an order of the United States District Court for the Southern District of New York (Carter, J.) denying its motion for preliminary injunctive relief against the enforcement of section 220 of New York's Labor Law. As a general rule, we do not disturb a district court's discretionary denial of a preliminary injunction, particularly where the plaintiff has not made a showing of irreparable harm or a balance of hardships tipping sharply in its favor. *See Pride v. Community School Board of Brooklyn*, 482 F.2d 257, 264 (2d Cir. 1973). However, in the instant case the parties agreed that only legal questions were involved and that no factual issues were presented. Accordingly, if we conclude that the district court's denial of plaintiff's motion for preliminary relief was based upon a misinterpretation of law that is basic to the issue of liability and may set a wrongful precedent, we have the power, and perhaps even the duty, to say so. *See Ring v. Spina*, 148 F.2d 647, 650 (2d Cir. 1945); *Nevill v. Shell Oil Co.*, 835 F.2d 209, 211 (9th Cir. 1987); 11 Wright & Miller, *Federal Practice and Procedure* § 2962 at 636-37 (1973). We hold that, as that portion of section 220 dealing with "supplements" is applied to employers in the position of appellant, it is preempted by section 514(a) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1001, *et seq.* Because the district court held to the contrary, we vacate the district court's order and remand for reconsideration of plaintiff's motion in the light of the proper legal principles.

As stated above, there is little or no dispute as to the facts. General Electric Company has a corporate "sub-

entity" known as the New York Service Center (hereafter "GE") whose principal place of business is in North Bergen, New Jersey. GE is a party to a collective bargaining agreement with Local 3 of the International Brotherhood of Electrical Workers. The contract provides for a number of nationally administered ERISA plans covering such things as pensions, disability, medical assistance and job and income security. The nature and scope of fringe benefits such as these are the result of collective bargaining and vary, of course, as between employers and also as between unions. However, insofar as the GE-Local 3 contract is concerned, the intent of the signatories, attested to by the undisputed sworn statement of GE's Manager of Employee Relations, was to have the incorporated supplemental benefits apply as equally as possible to all employees, regardless of the state or locality in which the employees might be working.

Since January 1987, a group of GE employees has been doing transformer maintenance and repair work for the Long Island Railroad in Kings, Queens, Nassau and Suffolk Counties pursuant to a public works contract. Section 220(3) of the New York Labor Law provides in substance that the wage rate on a public works contract shall be not less than the prevailing rate paid in the locality to the majority of workers in the same trade or occupation. Section 220(5)(a) defines prevailing wage rate as that which is paid in the locality by virtue of collective bargaining agreements between bona fide labor organizations and private employers who employ at least 30 percent of the workers in the same trade in the same locality.

Section 220(3) requires that "supplements" also be provided in accordance with local prevailing practices. Section 220(5)(b) defines "supplements" as "all remuner-

ation for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not 'wages' within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay and life insurance." Section 220(5)(c) provides in substance that the prevailing practice for supplements shall be determined in the same manner as the prevailing wage rate is determined.

The district court found that the supplements provided by GE were "different from, and in some cases less than those which the state claims are due under Section 220." In each instance where the cost of a supplement provided for in the GE-Local 3 contract did not correspond with the cost of a similar prevailing local benefit, section 220 required GE either to bring the cost of its prescribed benefit into equivalence with the cost of the local prevailing one or to pay the additional cost directly to the employee-beneficiaries. *Action Electrical Contractors Co. v. Goldin*, 64 N.Y.2d 213, 218 (1984). GE was not permitted to substitute one form of supplement for another. In the words of the Appellate Division Fourth Department, "the statute indicates that the Legislature intended that the Commissioner of Labor, not the contractor, determine the supplements to be provided and that the employee receive either the listed benefits or equivalent cash (or a combination of both)." *A.L. Blades & Sons, Inc. v. Roberts*, 136 A.D.2d 926, 927 (mem.), *leave to appeal denied*, 72 N.Y.2d 803 (1988). As the district court found, "GE received no credit under the statute for its cost of providing benefits which were not deemed to be 'prevailing benefits' by the Commissioner." The Commissioner simply computed what he deemed to be GE's cost of providing supplements that would meet prevailing local practices and notified the

Railroad to withhold $241,117 in payments owed GE, which, according to the Commissioner, represented the cost of effecting compliance plus interest and penalties.

GE then moved in the district court for a preliminary injunction restraining the State from enforcing the notice, from prosecuting any proceeding against GE for the violations alleged in the notice and from enforcing any of the provisions of section 220 pending a prior hearing. GE's arguments in support of this motion, which it continues to urge in this Court, are that New York's attempt to regulate GE's payment of supplemental benefits has been preempted by both the National Labor Relations Act, 29 U.S.C. § 151, *et seq.*, and ERISA. GE also argues in this Court that the manner in which wage and supplement rates are established under section 220, *i.e.*, by reference to other privately negotiated labor agreements, constitutes an unconstitutional delegation of legislative power. However, the district court did not understand that it was being asked to pass on this question and did not do so. Although we have on occasion considered contentions not raised in the district court where they involved only questions of law, *e.g.*, *Foster v. United States*, 329 F.2d 717, 718 (2d Cir. 1964), we think it better that the unconstitutional delegation argument be directed to the district court in the first instance on the remand we now direct.

Insofar as the relationship between section 220 and the NLRA is concerned, we agree with the district court that the State statute has not been preempted by the federal. *See Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 20 (1987) ("[T]he NLRA is concerned with ensuring an equitable bargaining process, nor with the substantive terms that may emerge from such bargaining."); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 755 (1985)

("Minimum state labor standards affect union and nonunion employees equally, and neither encourage nor discourage the collective-bargaining processes that are the subject of the NLRA."); *cf. Golden State Transit Corp. v. City of Los Angeles*, 475 U.S. 608, 619 (1986) (" 'Free collective bargaining is the cornerstone of the structure of labor-management relations carefully designed by Congress when it enacted the NLRA'. . . . Even though agreement is sometimes impossible, government may not step in and become a party to the negotiations.").

The issue of ERISA preemption is a different matter. Section 514(a) of ERISA provides in substance that the statute supersedes all State laws insofar as they "relate to" any employee benefit plan covered by the Act. In denying the existence of such relationship in the instant case, the district court adopted the reasoning of District Judge Sand in *Rondout Electric, Inc. v. New York State Dep't of Labor*, 84 Civ. 3095 (S.D.N.Y. 1984), to the effect that section 220 does not "do anything other than consider the value to the employee of contributions to [ERISA] as compared to the value of contributions made to similar plans by other employers in the industry and locality." This is not a correct statement of what section 220 does. The section originally was designed to insure that employees on public works were paid wages equivalent to the prevailing rate of similarly employed workers in the locality. *Smith v. Joseph*, 275 A.D. 201, 203, *aff'd*, 300 N.Y. 516 (1949). Because the statute made no reference to fringe benefits, bidders on public works contracts who provided no such benefits were in a position to underbid those who did. Accordingly, section 220 was amended in 1956 to require that all bidders on public works contracts assume the cost of prevailing fringe benefits in the locality, thus presum-

ably putting all bidders on an even footing.[1] *Action Electrical Contractors Co. v. Goldin, supra*, 64 N.Y.2d at 221-22. Section 220 measures supplements by their cost to the employer, not their "value to the employee." The employer may satisfy his statutory obligation by giving his employees the cash cost rather than the benefit:

> Under subdivision 3 of section 220 of the Labor Law, supplemental fringe benefits must be provided to such employees "in accordance with the prevailing practices in the same trade or occupation in the locality within the state" where the public work is located. This requirement will be fulfilled when employees are supplied with the cash equivalent of the cost of obtaining the prevailing benefits or by providing an equivalent benefits plan, or by a combination of benefits and cash equal to the cost of the prevailing benefits.

Action Electrical Contractors Co. v. Goldin, supra, 64 N.Y.2d at 218.

The Supreme Court holds that under ERISA, "private parties, not the Government, control the level of benefits." *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 511 (1981). The New York courts hold that under section 220, "the Commissioner of Labor, not the contractor, determine[s] the supplements to be provided." *A.L. Blades & Sons, Inc. v. Roberts, supra*, 136 A.D.2d at 927. These courts are adjudicating in the same area but reach-

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1 Because section 220 requires ex-locality employers to incur the cost of all locally prevailing supplements, while at the same time the statute denies them credit for non-prevailing pension and welfare benefits they are required by their collective bargaining agreements to provide, ex-locality employers in a situation such as this may be placed at a financial disadvantage in bidding.

ing inconsistent results, and that is exactly what ERISA was designed to prevent. *See* statements of Senator Williams and Congressman Dent quoted in *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 46 (1987), and *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 99 (1983).

As stated above, the GE-Local 3 bargaining agreement was designed to be applied uniformly to all employees in the bargaining unit regardless of their working location. This is what Congress hoped to accomplish when it enacted ERISA. *Local Union 598, Plumbers & Pipefitters Indus. Journeymen & Apprentices Training Fund v. J.A. Jones Constr. Co.*, 846 F.2d 1213, 1220 (9th Cir.), *aff'd sum.*, 109 S. Ct. 210 (1988); *Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320, 327 (2d Cir. 1985), *aff'd sum.*, 477 U.S. 901 (1986). At the present time, there is not even unity as between Nassau/Suffolk Counties on the one hand and Kings/Queens Counties on the other. Moreover, GE cannot eliminate the differences by single cash payments, as in *Fort Halifax Packing Co. v. Coyne*, *supra*, 482 U.S. at 12; *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1358 (9th Cir.), *cert. denied*, 479 U.S. 949 (1986); it is required to make continuous calculations, adjustments and payments.

Section 514(a) of ERISA was intended to have a "sweeping preemptive effect in the employee benefit plan field." *American Progressive Life and Health Ins. Co. v. Corcoran*, 715 F.2d 784, 786 (2d Cir. 1983). Congress intended ERISA to occupy and regulate the field of employee benefit plans. *Delta Air Lines, Inc. v. Kramarsky*, 650 F.2d 1287, 1303 (2d Cir. 1981), *modified on other grounds sub nom. Shaw v. Delta Air Lines*, *supra*, 463 U.S. 85; *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), *cert. denied*, 454 U.S. 968 (1981). It

sought to "preempt all state laws that *relate* to employee benefit plans and not just state laws which purport to regulate an area expressly covered by ERISA." *Wadsworth v. Whaland*, 562 F.2d 70, 77 (1st Cir. 1977), *cert. denied*, 435 U.S. 980 (1978); *see Pervel Indus., Inc. v. State of Connecticut Comm'n on Human Rights and Opportunities*, 468 F. Supp. 490 (D. Conn. 1978), *aff'd*, 603 F.2d 214 (2d Cir. 1979), *cert. denied*, 444 U.S. 1031 (1980); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344, 1351 (8th Cir. 1980).

A state law "relates to" employee benefit plans when it has "connection with or reference to" such plans, *Gilbert v. Burlington Indus., Inc.*, *supra*, 765 F.2d at 327 (quoting *Shaw v. Delta Air Lines*, *supra*, 463 U.S. at 97), "whenever it 'purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans.' 29 U.S.C. § 1144(c)(2) (1976)." *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323, 329 (2d Cir. 1982), *aff'd sum. sub nom. Arcudi v. Stone & Webster Engineering Corp.*, 463 U.S. 1220 (1983). Such connection exists where a state statute prescribes either the type and amount of an employer's contributions to a plan, *Local Union 598 v. J.A. Jones Constr. Co.*, *supra*, 846 F.2d at 1219; *Stone & Webster Engineering Corp.*, *supra*, 690 F.2d at 329; the rules and regulations under which the plan operates, *Hewlett-Packard Co. v. Barnes*, 425 F. Supp. 1294, 1297-1300 (N.D. Cal. 1977), *aff'd*, 571 F.2d 502 (9th Cir.) (per curiam), *cert. denied*, 439 U.S. 831 (1978); or the nature and amount of the benefits provided thereunder, *Standard Oil Co. v. Agsalud*, 442 F. Supp. 695, 706-07 (N.D. Cal. 1977), *aff'd*, 633 F.2d 760 (9th Cir. 1980), *aff'd sum.*, 454 U.S. 801 (1981). Section 220 intrudes into all three of these preempted areas. Ex-locality employers such as GE are required either to bring their pension and welfare plans

into conformity with those prevailing in the locality (as the prevailing plans are determined to exist by a State fiscal officer on the basis of job classifications made by the Department of Labor) or to make up the difference through cash payments to their employees. The employer is required to keep, and on request to file with the State, sworn schedules of supplements and wages and to make its books and records pertaining to wages, supplements and hours of labor available for inspection by a State fiscal officer. In the event the employer fails to bring a plan into conformity with a similar plan prevailing in the locality, the employee may be required to accept cash payments based on what the employer's cost would have been to accomplish conformity, *Action Electrical Contractors Co. v. Goldin*, *supra*, 64 N.Y.2d at 218, 222, payments that may be of lesser value to the employee than the unpaid benefits would have been. In sum, we conclude that the above-described provisions of section 220 clearly relate to the ERISA plans of ex-locality employers and are pre-empted by the federal statute.

We therefore vacate the district court's order denying GE's motion for a preliminary injunction and remand the matter to the district court for reconsideration of GE's motion in the light of the law as we have defined it herein. At the same time the district court may consider GE's due process argument based on the procedure followed in determining what constitutes prevailing supplements.

PRATT, *Circuit Judge*, dissenting:

Federal preemption under ERISA does not sweep so broadly that it invalidates a state law governing labor costs that neither purports to regulate employee benefits plans nor affects, directly or indirectly, a plan's primary administrative functions. Because the majority both overstates the impact of New York's prevailing wage law and breaks stride with our prior decisions in this area, I respectfully dissent from the majority's opinion insofar as it holds that § 220 is preempted by ERISA.

In our latest and perhaps most thorough discussion of ERISA preemption, we compared the types of laws that have been struck down under § 514 with those that have withstood preemption challenge. *See Aetna Life Ins. Co. v. Borges*, 869 F.2d 142, 145-47 (2d Cir.), *cert. denied*, 110 S. Ct. 57 (1989). We found the types of statutes that have been held preempted were "those that provide an alternative cause of action to employees to collect benefits protected by ERISA, refer specifically to ERISA plans and apply solely to them, or interfere with the calculation of benefits owed to an employee." The types of statutes that have survived preemption analysis were typically laws of general application, "often traditional exercises of state power or regulatory authority", whose economic and administrative effects on benefits plans were incidental to their primary objectives. *Id.* at 146. Generalizing from these cases, we concluded that "[w]hat triggers ERISA preemption is not just any indirect effect on administrative procedures but rather an effect on the primary administrative functions of benefits plans, such as determining an employee's eligibility for a benefit and the amount of that benefit." *Id.* at 146-47.

New York's prevailing wage law does none of these things. It does not interfere with any of the primary administrative functions of ERISA plans; it does not affect the structure or administration of benefits plans; it does not determine an employee's eligibility for benefits; nor does it control the type or level of benefits provided. Rather, the law seeks to equalize the minimum labor costs for employers bidding on public works contracts. It accomplishes this goal, in part, by requiring contractors to give their employees the cash equivalent of what it would cost them to provide the wage "supplements" (that is all fringe benefits, regardless of whether they are covered by ERISA) prevailing in the locality where the work is to be performed. *Action Elec. Contractors Co. v. Goldin*, 64 N.Y.2d 213, 474 N.E.2d 601, 485 N.Y.S.2d 241 (1984). If it chooses, a contractor may instead provide a combination of cash and benefits, or simply benefits alone, but nothing in the law forces employers to take either of these options; indeed, considerations of efficiency would encourage most employers to provide the cash payments rather than alter their benefits plans.

Regulation of labor costs in public works projects is surely a valid exercise of the state's traditional regulatory authority. As we have previously emphasized, where a law claimed to be superseded by ERISA "is an exercise of a State's police powers," the law should not be held preempted "unless this conclusion is unavoidable." *Rebaldo v. Cuomo*, 749 F.2d 133, 138 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008 (1985). While preemption may be an unavoidable conclusion where a state law explicitly singles out ERISA plans for different treatment, *see Mackey v. Lanier Collections Agency*, 486 U.S. 825 (1988), or directly alters the calculation or payment of benefits under ERISA-covered pension plans, *see Alessi v. Raybestos-*

Manhattan, Inc., 451 U.S. 504 (1981); *Stone & Webster Engineering Corp. v. Ilsley*, 690 F.2d 323 (2d Cir. 1982), *aff'd mem.*, 463 U.S. 1220 (1983), or creates a cause of action to enforce a right granted by ERISA, *see Gilbert v. Burlington Indus., Inc.*, 765 F.2d 320 (2d Cir. 1985), *aff'd mem.*, 477 U.S. 901 (1986), no such problem is presented by the statute before us. The fact that employers may choose to comply with the law by providing a different benefits plan or a combination of benefits and cash rather than by simply paying the additional costs as wages, does not render the statute preempted. *See Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 108 (1983) (while a state may not require employers to alter their ERISA plans, it is not preempted from giving them that option as a means of complying with state law).

The incidental administrative burdens this law places on benefits plans are comparable to, and certainly no worse than, the burdens involved in *Rebaldo* and *Aetna Life*. The state statute in *Rebaldo* prescribed what hospitals could charge for in-patient care, thus precluding ERISA plans from negotiating their own discount rates with hospitals and forcing the plans to operate differently and more expensively in that state. In *Aetna Life*, compliance with a state escheat law required ERISA plans to undertake record-keeping and other administrative duties different from its responsibilities in other states. In both cases, compliance with the state law had both an administrative and an economic impact on ERISA plans, but in neither case did we conclude that such effects required preemption.

Similarly, New York's prevailing wage law requires an employer to satisfy certain administrative responsibilities, such as making its books and records available for inspec-

tion. As in *Rebaldo* and *Aetna Life*, these requirements may make an employer's benefits plan somewhat more expensive to operate. Yet these requirements are merely incidental to the law's primary goal of equalizing the labor costs of local and ex-locality contractors, and they impose no greater expense or burden than the laws upheld in *Rebaldo* and *Aetna Life*. Indeed, we expressly noted in *Rebaldo* that the very type of law at issue here—a state law governing labor costs—was not the sort of statute that congress intended to preempt, despite its impact on the cost and administration of pension plans. 749 F.2d at 138 (ERISA does not preempt "State labor laws that govern working conditions and labor costs" even though compliance with such laws may increase the cost of operating benefits plans); *accord Aetna Life*, 869 F.2d at 145.

The majority does not attempt to distinguish *Rebaldo* or *Aetna Life*, nor, in my view, could it sensibly do so. Like the statutes we upheld in those decisions, New York's prevailing wage statute is a law of general application whose tangential effects on employee benefits plans are negligible and wholly incidental to the law's primary purpose. Since the majority opinion departs from the wise path charted by our prior decisions, I dissent. New York's prevailing wage law is not preempted by ERISA, and the order of the district court should be affirmed.

APPENDIX B

Order of the U.S. Court of Appeals Entered January 10, 1990 Denying Petition for Rehearing

United States Court of Appeals
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January, one thousand nine hundred and nineteen-ninety.

DOCKET NUMBER 88-7922

GENERAL ELECTRIC COMPANY,
Plaintiff-Appellant,

— v. —

NEW YORK STATE DEPARTMENT OF LABOR: THOMAS P. HARTNETT, INDUSTRIAL COMMISSIONER OF THE STATE OF NEW YORK; CHARLES DROBNER, DIRECTOR OF PUBLIC WORK, NEW YORK STATE DEPARTMENT OF LABOR; ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK,
Defendants-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by Appellees NEW YORK STATE DEPARTMENT OF LABOR, et. al.,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH
Clerk

APPENDIX C

OPINION OF THE UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF NEW YORK 88 Civ. 5154 (RLC)

GENERAL ELECTRIC COMPANY,

Plaintiff,

— against —

NEW YORK STATE DEPARTMENT OF LABOR; THOMAS P. HARTNETT, Industrial Commissioner of the State of New York; CHARLES DROBNER, Director of Public Work, New York State Department of Labor; ROBERT ABRAMS, Attorney General of the State of New York,

Defendants.

APPEARANCES

VEDDER, PRICE, KAUFMAN, KAMMHOLZ & DAY
Attorneys for Plaintiff
1 Dag Hammarskjold Plaza
New York, New York 10017

VIRGIL B. DAY
LORAINE M. CORTESE-COSTA
MARC S. WENGER

Of Counsel

ROBERT ABRAMS
Attorney General of the State of New York
Attorney for Defendants
120 Broadway
New York, New York 10271

JANE LAUER BARKER
Assistant Attorney General
In Charge of Labor Bureau
RICHARD S. CORENTHAL
M. PATRICIA SMITH
Assistant Attorneys General

Of Counsel

CARTER, District Judge

Plaintiff General Electric Company ("GE") entered a contract with the Long Island Railroad ("LIRR") to service electric transformers owned by the railroad and located on Long Island. New York State has sought to enforce its so-called prevailing wage law against GE in connection with this contract, and GE has responded by seeking declaratory and injunctive relief against the state. At a hearing held July 26, 1988, the parties stipulated to a continuation of the status quo pending the court's expedited decision on GE's motion for a preliminary injunction. It was agreed that the sole issues for court determination were (1) whether New York's prevailing wage law, N.Y. Lab. Law § 220 (McKinney 1986), is pre-empted by either the National Labor Relations Act ("NLRA"), 29 U.S.C. § 151 *et seq.*, or the Employee

Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1001 *et seq.*, and (2) whether Section 220 may properly be applied to the LIRR in any case. The parties agreed that these were purely legal questions and that no factual presentation was required. The issues were fully discussed in the briefs filed. We now proceed to determination.

Background

Section 220 of New York's Labor Law ("Section 220") requires contracts for the performance of public work to contain provisions which (1) limit the working day of laborers employed under the contract and (2) require them to be paid wages and benefits which at least equal prevailing wages and benefits paid to laborers employed in the same trade or occupation in that locality. N.Y. Lab. Law § 220(2)-(3).

If at least thirty percent of the laborers employed in a particular trade are covered by collective bargaining agreements in a particular locality, then the prevailing wages and benefits which public works contractors are required to pay are determined by reference to those agreements. Otherwise, the prevailing wage under the statute is the "average wage" paid in the trade in that locality. *Id.* § 220(5)(a).

In January, 1987, GE entered a contract with the LIRR to service and repair electric transformers located in Kings, Queens, Nassau, and Suffolk counties. The contract specifications included a schedule of prevailing wages and benefits based on two collective bargaining agreements concluded by locals of the International Brotherhood of Electrical Workers ("IBEW"), one covering laborers

employed in Queens and Kings Counties, and one covering laborers employed in Nassau and Suffolk Counties.

Performance of the contract was undertaken by General Electric Apparatus and Engineering Services — New York Service Center, a sub-entity of GE. The Service Center's principal place of business is in North Bergen, New Jersey, but the work at issue in this case was performed in New York State. The Service Center's employees are represented by Local 3, IBEW, and collective bargaining agreements between Local 3 and GE have been in force during the entire period at issue. These agreements provide for the payment of wages and benefits which are different from, and in some cases less than those which the state claims are due under Section 220.

In conformity with a decision issued by the New York Court of Appeals, *Action Electric Contractors Co., Inc. v. Goldin*, 64 N.Y.2d 213, 485 N.Y.S.2d 241, 474 N.E.2d 601 (1984), the state interprets Section 220 as allowing employers to provide required benefits in the form of cash payments equal to the employer cost of the required benefits in lieu of providing the benefits themselves. However, the department does not allow the cost of benefits that do not qualify as "prevailing benefits" to be counted as an offset towards an employer's obligation to provide required benefits or their cash equivalent. Thus, GE received no credit under the statute for its cost of providing benefits which were not deemed to be "prevailing benefits" by the Commissioner.

The record before the court does not permit any conclusion to be drawn as to the identity or nature of the benefits for which GE has been denied credit. While GE has suggested that these exclusions add to the illegality of the state's actions in this case, no specific claim has been

made that they are improper, and this decision does not consider that issue.[1]

Determination

A. NLRA Pre-emption

The NLRA pre-empts state law in two situations.[2] The first is "when it is clear or may fairly be assumed that the activities which a state purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8."[3] *San Diego Building Trades Council v. Garmon,* 359 U.S. 236, 244, 79 S.Ct. 773, 779, 3L.Ed.2d 775 (1959). As the Court explained, "[t]o leave the states free to regulate conduct so plainly within the central aim of federal regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law." *Id.* More recently,

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[1]It may also be the case, though the submitted documents are unclear on this question, that the state does not allow excess costs incurred by an employer in providing a particular benefit to be counted as an offset towards the employer's obligation to provide another benefit which is under-funded according to the prevailing benefit standard. In other words, it may be the case that the state treats each prevailing benefit as a separate obligation which is either satisfied or not, based on whether the cost incurred by the employer in providing that particular benefit (or in the form of a cash payment offered in lieu of the benefit) equals or exceeds the prevailing standard for that benefit. *See* Bleiberg aff., ¶ 11, and Exhibits C, D; Whittaker aff., ¶ 26; Plaintiff's Complaint, Exhibit B. This decision passes no judgement on the propriety of exclusions of this type either. Indeed, by agreeing to have the court issue its decision upon submissions, the parties agreed at least sub silentio that these issues were not before the court.

[2]See *Metropolitan Life Ins. Co. v. Mass.*, 471 U.S. 724, 748-51, 105 S.Ct. 2380, 2993-95, 85 L.Ed.2d 728.

[3]Section 7 of the NLRA (codified as 29 U.S.C. § 157) protects the right of employees to engage in concerted activity or to refrain from such activity. Section 8 of the act (codified as 29 U.S.C. § 158) declares certain practices by employers and employees to be prohibited unfair labor practices.

the Court explained the purpose of the *Garmon* rule as the protection of "the primary jurisdiction of the NLRB to determine in the first instance what kind of conduct is either prohibited or protected by the NLRA." *Metropolitan Life Ins. Co. v. Mass.* 471 U.S. 724, 748, 105 S.Ct. 2380, 2393, 85 L.Ed.2d 728 (1985).

The second type of federal pre-emption occurs when a state attempts to regulate an activity which Congress intended to be left unregulated, even though the activity is arguably neither protected by Section 7 nor prohibited by Section 8 of the NLRA. The rationale for this type of pre-emption is to avoid upsetting "the balance of power between labor and management expressed in our national labor policy." *Teamsters v. Morton,* 377 U.S. 252, 260, 84 S.Ct. 1253, 1258, 12L.Ed.2d 280 (1964).[4]

This second type of pre-emption is illustrated by the holding in *Machinists v. Wisconsin Employment Relations Comm'n,* 427 U.S. 132, 96 S.Ct. 2548, 49 L.Ed.2d 396 (1976). In *Machinists,* the Court held that a state could not enjoin a concerted refusal to work overtime on the basis of state law, even though the Regional Director of the National Labor Relations Board had determined that the activity "was not conduct cognizable by the Board." *Id.* at 135, 96 S.Ct. at 2550. The Court reasoned that Congress intended to leave such weapons of economic self-help unregulated.

[4]In *Morton* the Court held that damages could not be awarded to an employer on the basis of a state law claim concerning peaceful secondary boycott activity undertaken by a group of employees, even though the activity was arguably neither protected nor prohibited by the NLRA. The Court reasoned that by expressly allowing the federal courts to award damages to persons injured by certain kinds of secondary boycott activity, Congress intended to leave other kinds of secondary boycott activity unregulated in order "to leave this weapon of self-help available" to participants in a labor dispute. *Morton,* 377 U.S. at 258-60, 84 S.Ct. at 1257-59.

GE contends that Section 220 is pre-empted under both *Garmon* and *Machinists*. I disagree. *Garmon* is inapplicable since the contested state action here does not attempt to regulate an activity which is either protected or prohibited under the NLRA. Sections 7 and 8 of the NLRA are not concerned with the substantive outcome of the collective bargaining process, and efforts by states to limit the outcome of that process do not impinge on the jurisdiction of the NLRB to determine what employer and employee conduct the NLRA prohibits or permits.[5]

The inapplicability of the *Garmon* rule is illustrated by *Local 24 of the International Brotherhood of Teamsters v. Oliver*, 358 U.S. 283, 79 S.Ct. 297, 3L.Ed.2d 312 (1959), a case on which GE places considerable reliance. In *Oliver*, the Court held that a state anti-trust law was pre-empted by the NLRA. The statute at issue had been applied to invalidate provisions of a collective bargaining agreement regulating rental and other terms of leases under which truck drivers leased and operated their vehicles for lessee common carriers. Finding that the purpose and effect of the contract provisions were to fix wages and not prices, the Court held that the statute impermissibly interfered with the right and duty of the carriers and their employees to engage in collective bargaining regarding wages, hours, and other terms and conditions of employment.

To be sure, the opinion contains language indicating that the state anti-trust statute may not be applied "to prevent the contracting parties from carrying out their

[5]"The NLRA is concerned primarily with establishing an equitable process for determining terms and conditions of employment, and not with particular substantive terms of the bargain that is struck when the parties are negotiating from relatively equal positions." *Metropolitan Life*, 471 U.S. at 753, 84 S.Ct. at 1257-59.

agreement upon a subject matter as to which federal law directs them to bargain," *id.* at 295, 79 S.Ct. at 304, but the issue before the Court was not whether the state could impose substantive limits on the outcome of collective bargaining, but whether the state could use an anti-trust statute to prohibit employers and employees from engaging in collective bargaining. The Court found that the effect of the statute at issue in *Oliver* was to prevent collective bargaining over wages. Section 220, however, does not prevent GE from exercising its right and duty to engage in collective bargaining regarding wages and benefits. It merely imposes a floor on the wages GE can bargain for. The issue of whether states may impose such substantive limits on the outcome of collective bargaining was not addressed in *Oliver*.

In an effort to support its claim of federal pre-emption under *Garmon* principles, GE characterizes the state's action in enforcing Section 220 as an effort "to mandate a violation of NLRA 8(a)(5) by requiring GE to unilaterally alter the terms and conditions of employment established under its agreement." Plaintiff's Memorandum of Law in Support of Motion for Preliminary Injunction, p. 12. GE argues that it is being required "to 'replace' the wages and benefits contained in its [collective bargaining] Agreement with those in other collective bargaining agreements." Plaintiff's Memorandum of Law in Reply to Defendant's Opposition to Plaintiff's Motion for Preliminary Injunction, p. 4 [hereinafter "Plain. Reply Mem."].

If Section 220 actually did require GE to "replace" its collective bargaining agreement with another, then the *Garmon* rule would be implicated, but Section 220 does not

do that.[6] The only obligation imposed on GE is to comply with the minimum standards which the state has imposed.[7] Thus, rather than involving Sections 7 or 8 of the NLRA, the gravamen of GE's claim is that the state's establishment of these minimum standards regulates a matter which Congress intended to be left unregulated. Such a claim raises issues which has been addressed not in the *Garmon* line of cases, but in the line of cases articulating the principles of *Machinists* pre-emption.

The particular decision in the *Machinists* line of cases which is dispositive on the propriety of such standards is *Metropolitan Life.* In that case, a unanimous Court upheld a state statute that required certain minimum health care benefits to be included in employee health care plans covering hospital and surgical expenses. The appellants in that case made the same argument that GE has made,

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[6]GE also contends that reliance on collective bargaining agreements to determine prevailing wage and benefit standards brings Section 220 within the scope of the holding in *Allis-Chalmers Corp. v. Lueck,* 471 U.S. 202, 212, 105 S.Ct. 1904, 1911, 85 L.Ed.2d 206 (1985). This claim is without merit. In *Lueck* the Court held that "state-law rights and obligations that do not exist independently of private agreements, and that as a result can be waived or altered by agreement, are pre-empted by those agreements." *Id.* at 213, 105 S.Ct. at 1912. The right of workers employed on public works in New York State to be paid prevailing wages is derived from Section 220. It cannot be said to originate in the collective bargaining agreements which the state uses to determine prevailing rates, since the right would exist even if there were no collective bargaining agreements in effect in the state.

[7]To be sure, the State relies on collective bargaining agreements to determine prevailing wages and benefits (when at least thirty percent of the laborers employed in a particular trade are covered by such agreements), but public works contractors do not have to enter a collective bargaining agreement to engage in public work, nor do they have to replace any collective bargaining agreements they may have with their employees. They remain free, whether under the terms of a collective bargaining agreement or spontaneously, to pay more than the State's minimum standards require.

namely, that in enacting the NLRA Congress "intended to prevent the states from establishing minimum employment standards that labor and management would otherwise have been required to negotiate from their federally protected bargaining positions, and would otherwise have been permitted to set at a lower level than that mandated by state law." *Metropolitan Life*, 471 U.S. at 751, 105 S.Ct. at 2395. The Court rejected this argument.

> "[T]here is no suggestion in the legislative history of the Act that Congress intended to disturb the myriad state laws then in existence that set minimum labor standards, but were unrelated in any way to the processes of bargaining or self-organization.... Federal labor law in this sense is interstitial, supplementing state law where compatible, and supplanting it only when it prevents the accomplishment of the purposes of the federal Act. *Id.* at 756, 105 S.Ct. at 2397.

To overcome this holding GE argues that a *prevailing* wage statute like Section 220 does not establish *minimum* labor standards, because:

> "a prevailing wage is in the nature of an average wage (and contractors in the locality and throughout the state will pay above and below the rate) which varies from year to year and in accordance with the economic climate which dictates the outcome of industry/union negotiations; employees of the state and its municipalities who perform public work do not receive the wage; prevailing wage requirements are not generally applicable to private persons and corporations, except when such persons contract with the state; and, the prevailing wage is not set by statute

> state; and, the prevailing wage is not set by statute but is derived from private agreements throughout the state." Plain. Reply Mem. at 9-11 (footnote omitted).

This argument is unpersuasive. The state's standards are indeed based on prevailing rather than minimum wages paid in the private sector, but once the standards have been determined by the Commissioner, they have a legal effect on covered employers and employees exactly like other minimum wage statutes. Nor does the fact that these standards are determined by an administrative process alter their character as obligations imposed by statute. It also does not matter that the coverage of the statute is limited and that it requires the payment of wages above those which uncovered employees may be paid. The coverage of minimum wage statutes is rarely universal,[8] and the state has a rational reason for applying this statute to the employees of private contractors engaged in performing public work and for setting its minimum standards at the level it has selected.[9]

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[8]When initially enacted, the federal minimum wage covered only about 43 percent of all nonsupervisory wage and salary workers, mainly those employed in larger firms involved in extensive interstate commerce. *See* R. Ehrenberg & R. Smith *Modern Labor Economics* 77-79 (3d ed. 1988). Even today, the federal minimum wage covers less than 90 percent of all nonsupervisory wage and salary workers. *See* Smith and Vavrichek, *The Minimum Wage: Its Relation to Incomes and Poverty*, 110 Monthly Lab. Rev. 24 (June 1987).

[9]The New York Constitution requires laborers, workmen and mechanics employed by a contractor performing public work to be paid prevailing wages and work no more than eight hours a day and five days a week. N.Y. Const. art. 1, § 17. Section 220 gives effect to this constitutional provision. New York courts have interpreted the statute as intending "to insure that workmen on public projects will receive an adequate wage," and as affording "protection to a contractor by giving him some foreknowledge of potential labor costs when bidding on such

(footnote continued on next page)

The cases which GE cites in support of its position are all distinguishable. In *Golden State Transit Corp. v. Los Angeles*, 475 U.S. 608, 106 S.Ct. 1395, 89 L.Ed.2d 616 (1986), the city conditioned a franchise renewal on the settlement of an ongoing labor dispute, thus impermissibly intruding itself into the collective-bargaining process. As the Court noted, "[e]ven though agreement is sometimes impossible [in free collective bargaining], government may not step in and become a party to the negotiations." *Id.* 106 S.Ct. at 1401. No similar circumstance exists in the instant case.

In *Hydrostorage, Inc. v. Northern California Boilermakers*, 685 F. Supp. 718 (N.D. Cal. 1988), the NLRA was held to pre-empt a statute requiring contractors engaged in public works to participate in a mandated apprenticeship training program, because it would require the plaintiff "to become a party to certain provisions of the Boilermakers collective bargaining agreement." *Id.* at 725. Citing *Golden State*, the court reasoned that "a state cannot penalize an employer for not becoming a party to a collective bargaining agreement, in whole or in part, which it did not voluntarily negotiate." *Id.* Under Section 220, GE would be required to pay certain minimum wages and supplements, not enter a collective bargaining agreement.

In *Bechtel Construction v. United Brotherhood of Carpenters*, 812 F.2d 1220 (9th Cir. 1987), the court held that an across-the-board wage reduction negotiated in a collective

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projects." *Brang Co. v. State U. Const. Fund*, 47 A.D.2d 178, 365 N.Y.S.2d, 914, 916 (3d Dept. 1975). The purpose of the amendments to the statute which brought wage supplements within its purview has been described as "a concern to equalize contractors' minimum labor costs," so that employers who do not provide fringe benefits to their employees would not have a competitive advantage in bidding on public works contracts. *Action Electric Contractors. Co. v. Goldin*, 64 N.Y.2d 213, 222, 485 N.Y.S.2d 241, 245, 474 N.E.2d 601 (1984).

bargaining agreement did not have to give way to a higher wage schedule contained in an "Agreement to Train Pipe Trades Apprentices" which the plaintiff construction company had entered with an industry apprentice training program operated jointly by labor and management representatives. The "Apprenticeship Agreement" included a wage rate schedule approved by the California Division of Apprenticeship Standards in conformity with state law. The holding was principally based on the court's finding that "California law cannot reasonably be interpreted to place its apprenticeship wage standards above the collective bargaining process," *id.* at 1222, but the court went on to "consider only briefly whether federal labor law forbids what is forbidden by California law." *Id.* at 1225.

With respect to this latter issue, the *Bechtel* court concluded that "[t]he negotiation of wage rates ... is protected activity under section 7" of the NLRA, and that section 7 "would therefore preempt any attempt to enforce the Approved Standards against collectively bargained-for wage rates." *Id.* Recognizing that "*Metropolitan Life* seems at first glance to contradict [this] conclusion," the court cited two factors which distinguished *Bechtel* from that case.

First, the court reasoned that the standards at issue in *Bechtel* were not like the minimum labor standards protected in *Metropolitan Life*, because they could be "undercut" with the approval of the state agency charged with enforcing the standards,[10] and "[a] 'minimum' by definition

[10] In support of its interpretation of state law, the appellant union and apprenticeship training program had relied on an "Information Bulletin" issued by the state Division of Apprenticeship Training which indicated that when a lower rate of pay is negotiated for apprentices in a collective bargaining agreement, the wages specified in the agency's "Approved Standards" had to be paid until a wage revision was submitted and approved by the Division of Apprenticeship Training.

cannot be undercut." *Id.* at 1225-26. Secondly, the court reasoned that "the Court in *Metropolitan Life* failed to consider that such standards can sometimes have a serious effect on the collective bargaining process," because the higher wages which the state sought to enforce for apprentices would upset the wage scale for which higher-level tradespeople had bargained.

There is no real support for GE's position in this holding. Unlike the California standards at issue in *Bechtel*, the wage and hours standards established under the authority of Section 220 cannot be "undercut" with the consent of the state agency charged with enforcing them, and the standards apply to all tradespeople, not just to one grade of labor."

The Supreme Court did not define the scope of the "minimum labor standards" category in *Metropolitan Life*,

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"Furthermore, the *Bechtel* court's reading of the holding in *Metropolitan Life* can be criticized as excessively narrow. First, the *Bechtel* court's holding that "a 'minimum' by definition cannot be undercut" is hard to reconcile with *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), in which minimum severance payment standards were held to be minimum labor standards even though they could be undercut by private severance payment agreements between employers and their employees. *Id.* 107 S.Ct. at 2213, n. 1, 2222-23, 96 L.Ed.2d 1. Clearly, minimum labor standards do not have to be impregnable to undercutting to avoid pre-emption. Secondly, the *Bechtel* court's holding that the California wage standards were pre-empted because they did not affect all workers equally (and therefore disrupted wage scales for which higher-level tradespeople had bargained) is hard to reconcile with the protection afforded by *Metropolitan Life* to state minimum wage statutes. *Metropolitan Life*, 471 U.S. at 755, 105 S.Ct. at 2397. Minimum wage statutes have the very same effect which concerned the *Bechtel* court. In practice, they too apply only to the lowest grade of labor employed in an enterprise and can therefore disrupt wage scales for which higher-level tradespeople have bargained. Thus, it is hard to understand how this consideration supports a holding that the California statute at issue in *Bechtel* is pre-empted.

but there is no reason to give the term a restricted interpretation. As the Court commented in *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 107 S.Ct. 2211, 2222, 96 L.Ed.2d 1 (1987), "pre-emption should not be lightly inferred in this area, since the establishment of labor standards falls within the traditional police power of the State." Certainly, no blanket prohibition of state regulations having a substantive impact on the collective bargaining process can properly be read into the NLRA. It is always necessary to determine whether Congress intended to permit the type of state regulation at issue.

For example, in *Malone v. White Motor Corp.*, 435 U.S. 497, 98 S.Ct. 1185, 55 L.Ed.2d 443 (1978), the Court looked to the federal statute which regulated the disclosure of information by private pension plans prior to ERISA to determine whether Congress intended the NLRA to pre-empt state authority to regulate pension plans.[12]

The same analytical approach was used by the Court in *New York Telephone Co. v. New York Labor Dept.*, 440 U.S. 519, 99 S.Ct. 1328, 59 L.Ed.2d 553 (1979). The Court acknowledged that New York's practice of permitting strikers to collect unemployment compensation benefits "altered the economic balance between labor and management," and that this arguably brought the case within the purview of the *Machinists* rule for NLRA pre-emption. *Id.* at 531-32, 99 S.Ct. at 1336-37. Nevertheless, as in *Malone*, the Court did not accept the proposition that the NLRA impliedly pre-empts all state action which affects the outcome of collective bargaining, but instead looked to the legislative history of the Social Security Act (which was enacted

[12]Pre-emption of the Minnesota statute by ERISA was acknowledged, but the case involved state regulation of pension plans prior to the enactment of ERISA.

the same summer as the NLRA) to determine that Congress did not intend the NLRA to prohibit states from providing unemployment compensation benefits to strikers.

The common thread in the Supreme Court's "minimum labor standard" concept is not a dictionary definition of "minimum," nor a requirement that the minimum standards be neutral in their effect on the collective bargaining process, but a judgement that the substantive rights which the state seeks to create are consistent with the "general legislative goals of the NLRA." *Metropolitan Life*, 471 U.S. at 757, 105 S.Ct. at 2398.

These goals are not purely procedural. In enacting the NLRA Congress intended not only to provide for free collective bargaining, but thereby to help the nation overcome a variety of economic problems attributable to depressed and unstable wage rates.[13] Consistency with these goals is the real touchstone of the "minimum labor standard" concept articulated in *Metropolitan Life:*

> The evil Congress was addressing thus was entirely unrelated to local or federal regulation establishing minimum terms of employment. Neither inequality of bargaining power nor the resultant depressed wage rates were thought to result from the choice between having terms of employment set by public law or having them set by private agreement. No incompatibility exists, therefore, between federal rules

[13] "The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C. § 151.

> designed to restore the equality of bargaining power, and state or federal legislation that imposes minimal substantive requirements on contract terms negotiated between parties to labor agreements, at least so long as the purpose of the state legislation is not incompatible with these general goals of the NLRA. *Metropolitan Life*, 471 U.S. at 754-55, 105 S.Ct. at 2397.

Consistency between the purposes of Section 220 and the express goals of the NLRA therefore provides further support for the conclusion that the prevailing wage standards established under the statute are minimum standards within the meaning of *Metropolitan Life*.

B. ERISA Pre-emption

Whether ERISA pre-empts Section 220 on its face has already been decided by this court in an unpublished memorandum endorsement by Judge Sand in *Rondout Electric Inc., v. New York State Department of Labor, et al.*, 84 Civ. 3095 (S.D.N.Y. 1984) (Sand, J.). The facts in that case were essentially the same as in this one. The plaintiff had entered a contract with a municipality to perform work on its sewage treatment plant, and the state had commenced administrative proceedings to enforce the provisions of Section 220 relating to wage supplements. Without first exhausting its administrative remedies under state law, the plaintiff sought declaratory and injunctive relief based on the theory that ERISA's very broad pre-emption clause, 29 U.S.C. § 1144, invalidates Section 220 on its face.

In granting the state's motion for summary judgment with respect to the ERISA pre-emption claim, Judge Sand reasoned that:

> Plaintiff cannot validly maintain that the New York State prevailing wage law on its face is pre-empted by

> ERISA merely because employee benefit plans are considered in determining the total compensation package paid to employees in the industry and locality. The statute does not require the maintenance of such plans, regulate their terms or do anything other than consider the value to the employee of contributions to such plans as compared to the value of contributions made to similar plans by other employers in the industry and locality. An analogy may be helpful. If it was a practice in a particular industry and locality to pay employee bonuses in United States Savings Bonds, the fact that the actual value of such payments would be considered in determining the "prevailing wage" would no more constitute an invalid intrusion by the state into United States Treasury matters than does New York's consideration of the value of contributions made to federally regulated employee benefit plans. The Court recognizes the broad scope of federal pre-emption where a state in fact seeks to regulate ERISA plans, but such is not the case here. *Id.* at 3.

This reasoning is persuasive and I adopt it to dispose of GE's identical claim. As with the plaintiff in *Rondout*, GE's further claim that Section 220 interferes with employee benefit plans in its practical effect is not ripe for review on this record. If issues exist under either state or federal law as to the propriety of the state's administration of the statutory scheme (including the state's practice of disregarding the cost to an employer of benefits which are deemed not to be prevailing supplements, or the state's possible practice of disallowing excess expenditures for one benefit to be used as a set-off against the employer's

other obligations) then GE may raise them when they are ripe for review.

C. The Applicability of Section 220 to the LIRR

GE claims that application of Section 220 to the LIRR is impermissible under both state and federal law. We are barred by the Eleventh Amendment from considering the state law claim, *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984),[14] so the only issue to be decided is whether federal law pre-empts application of Section 220 to work contracted with the LIRR.

GE argues that pre-emption exists on the basis of the general interest of the federal government in regulating railways engaged in interstate commerce. The Commerce Clause clearly gives the federal government the right to regulate interstate railways. *United Transportation Union v. Long Island Railroad Co.*, 455 U.S. 678, 682-83, 102 S.Ct. 1349, 1352-53, 71 L.Ed.2d 547 (1982). Thus, Congress *could* enact a statute that would pre-empt application of Section 220 to the railroad's contractors. The issue, though, is whether Congress has in fact enacted such a statute. GE identifies none but urges the view that pre-emption can be based on the fact that Congress has chosen to regulate some other aspects of railroad operations. This is a theory of pre-emption which this court declines to follow.

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[14]GE argues against this conclusion on the theory that the State has waived its Eleventh Amendment immunity by operating a railroad in interstate commerce. *See Parden v. Terminal Railway*, 377 U.S. 184, 84 S.Ct. 1207, 12 L.Ed.2d 233 (1964). It is the New York State Department of Labor which is a defendant in this suit, though, not the LIRR. Where the State or one of its agencies is named as the defendant, the Eleventh Amendment clearly does apply. *Pennhurst*, 465 U.S. at 100, 104 S.Ct. at 907.

Conclusion

Having found no merit in plaintiffs claims that Section 220 is pre-empted on its face by the NLRA, ERISA, or other federal statutes, plaintiffs motion for a preliminary injunction is denied.

IT IS SO ORDERED

Dated: September 29, 1988
New York, New York

ROBERT L. CARTER
U.S.D.J.

APPENDIX D

RELEVANT STATUTORY PROVISIONS

Section 1002 of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C.A. § 1001 *et seq.* (West 1989), provides, in pertinent part:

¶ 1002. Definitions

For purposes of this subchapter:

(1) The terms "employee welfare benefit plan" and "welfare plan" mean any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death of or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions).

Section 1144(a) of ERISA (West 1985) provides:

§ 1144. Other Laws

(a) Supersedure; effective date

Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any

employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title. This section shall take effect on January 1, 1975.

Section 220(3) (first undesig. para.) of N.Y. Labor Law (McKinney 1986) provides, in pertinent part:

> The wages to be paid for a legal day's work, as hereinbefore defined, to laborers, workmen or mechanics upon such public works, shall be not less than the prevailing rate of wages as hereinafter defined.
>
> * * *

Section 220(3) (second undesig. para.) of N.Y. Labor Law (McKinney 1986) provides, in pertinent part:

> The supplements, as hereinafter defined, to be provided to laborers, workmen or mechanics upon such public works, shall be in accordance with the prevailing practices in the locality, as hereinafter defined.
>
> * * *

Section 220(3) (third undesig. para.) of N.Y. Labor Law (McKinney 1986) provides:

> It shall be the duty of the fiscal officer, as defined in this section, to ascertain and determine the schedules of supplements to be provided and wages to be paid workmen, laborers and mechanics on such public work, prior to the time of the advertisement for bids, and such schedules shall be annexed to and form a part of the specifications for the work. Such fiscal officer shall file with the department having jurisdiction such schedules to the time of the commencement of the advertisement for bids on all public works proposed to be constructed. The term "contract" as used in this subdivision also shall include reconstruction and repair of any such public work.

Section 220(5)(a) of N.Y. Labor Law (McKinney 1986) provides:

> 5. Definitions. a. The "prevailing rate of wage," for the intents and purposes of this article, shall be the rate of wage paid in the locality, as hereinafter defined, by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality where the work is being performed. The prevailing rate of wage shall be annually determined in accordance herewith by the fiscal officer no later than thirty days prior to July first of each year, and the prevailing rate of wage for the period commencing July first of such year through June thirtieth, inclusive, of the following year shall be the rate of wages set forth in such collective bargaining agreements for the period commencing July first through June thirtieth, including those increases for such period which are directly ascertainable from such collective bargaining agreements by the fiscal officer in his annual determination. In the event that it is determined after a contest, as provided in subdivision six of this section, that less than thirty percent of the workers, laborers or mechanics in a particular trade or occupation in the locality where the work is being performed receive a collectively bargained rate of wage, then the average wage paid to such workers, laborers or mechanics in the same trade or occupation in the locality for the twelve-month period preceding the fiscal officer's annual determination shall be the prevailing rate of

wage. Laborers, workers or mechanics for whom a prevailing rate of wage is to be determined shall not be considered in determining such prevailing wage.

Section 220(5)(b) of N.Y. Labor Law (McKinney 1990) provides:

b. "Supplements," for the intents and purposes of this article, means all remuneration for employment paid in any medium other than cash, or reimbursement for expenses, or any payments which are not "wages" within the meaning of the law, including, but not limited to, health, welfare, non-occupational disability, retirement, vacation benefits, holiday pay, life insurance, and apprenticeship training.

Section 220(5)(c) of N.Y. Labor Law (McKinney 1986) provides:

c. "Prevailing practices in the locality," for the intents and purposes of this article, shall be the practice of providing supplements, as hereinbefore defined, as provided by virtue of collective bargaining agreements between bona fide labor organizations and employers of the private sector, performing public or private work provided that said employers employ at least thirty per centum of workers, laborers or mechanics in the same trade or occupation in the locality, as determined by the fiscal officer in accordance with the provisions herein.

With respect to each supplement determined to be one of the prevailing practices in the locality, the amount of such supplement shall be determined in the same manner and at the same times as the prevailing rate of wage is determined pursuant to this section.